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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1304

GEAUGA PLASTICS COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

Citations II
Opinions Below 2
Jurisdiction 2
Questions Presented 2
Statute Involved 3
Statement of the Case 3
Reasons for Granting the Writ 9
Question Number I Restated 9
A. The Transfers, Reprimand, Disciplinary Layoffs, and Discharge on March 24, 1966, Six Months After All Union Activity Had Ceased .. 11
B. The Insubstantiality, Lack of Probative Value, and Improper Reliance upon the Board's Finding That Foreman Arbogast Did Not Deny Iiams' Charge That He Assigned Her to the Hardest Jobs and Asked Her to Quit 13
C. The Improper Reliance upon Fragments of Herman Haygood's Testimony Without Taking Into Account Evidence from Which Conflicting and More Appropriate Inference Could Be Drawn 15
Question Number II Restated 17
Conclusion 28
Appendix A—Trial Examiner's Decision A1
Appendix B—Decision and Order A15
Appendix C—Decision of U.S. Court of Appeals, Sixth Circuit A28
Appendix D—Section 10(c), National Labor Relations Act, as Amended A31

Citations

CASES:

Acme Products, Inc. v. *N.L.R.B.*, 389 F.2d 104 (8 Cir. 1968) 12

Board of Publication of Methodist Church v. *N.L.R.B.*, 297 F.2d 379 (6 Cir. 1962) 21

Cain's Coffee Company v. *N.L.R.B.*, 404 F.2d 1172 (10 Cir. 1968) 25

Fort Smith Broadcasting Company v. *N.L.R.B.*, 341 F.2d 874 (8 Cir. 1965) 22

Frosty Morn Meats, Inc. v. *N.L.R.B.*, 296 F 2d 617 (5 Cir. 1961) 16

Hawkins v. *N.L.R.B.*, 358 F.2d 281 (7 Cir. 1966) 21

Herb Stein, Inc. v. *N.L.R.B.*, 368 F.2d 556 (6 Cir. 1966) 19

Lawson Milk Company v. *N.L.R.B.*, 317 F.2d 756 (6 Cir. 1963) 18

Lozano Enterprises v. *N.L.R.B.*, 357 F.2d 500 (9 Cir. 1966) 22

N.L.R.B. v. *Almeida Bus Lines, Inc.*, 333 F.2d 725 (1 Cir. 1964) 17

N.L.R.B. v. *Atlanta Coca-Cola Bottling Co.*, 293 F.2d 300 (5 Cir. 1961), rehearing denied, 296 F.2d 896 (1961) 20

N.L.R.B. v. *Barberton Plastic Products, Inc.*, 354 F.2d 66 (6 Cir. 1965) 15, 18

N.L.R.B. v. *Billen Shoe Co.*, 397 F.2d 801 (1 Cir. 1968) 17, 24

N.L.R.B. v. *Citizen-News Company*, 134 F.2d 970 (9 Cir. 1943) 22

N.L.R.B. v. *Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6 Cir. 1964) 15

N.L.R.B. v. *Greensboro Hosiety Mills, Inc.*, 398 F.2d 414 (4 Cir. 1968) 24

N.L.R.B. v. *Howard Quarries, Inc.*, 362 F.2d 236 (8 Cir. 1966) 21

N.L.R.B. v. *Midwestern Mfg. Co.*, 388 F.2d 251 (10 Cir. 1968) 26

N.L.R.B. v. *Mount Vernon Telephone Corp.*, 352 F.2d 977 (6 Cir. 1965) 15, 20

N.L.R.B. v. *Neuhoff Brothers Packing, Inc.*, 389 F.2d 640 (5 Cir. 1968) 21, 23, 26

N.L.R.B. v. *Prince Macaroni Mfg. Co.*, 329 F.2d 803 (1 Cir. 1964) 17

N.L.R.B. v. *Shen-Valley Packers*, 211 F.2d [illegible] (4 Cir. 1954) 21

N.L.R.B. v. *Supreme Bedding and Furniture Company*, 196 F.2d 997 (5 Cir. 1952) 21

N.L.R.B. v. *Swan Super Cleaners, Inc.*, 384 F.2d 609 (6 Cir. 1967) 18

N.L.R.B. v. *United Parcel Service, Inc.*, 317 F.2d 803 (1 Cir. 1963) 17

Raytheon Co. v. *N.L.R.B.*, 326 F.2d 471 (1 Cir. 1964) 17

Rocky Mtn. Gas Co. v. *N.L.R.B.*, 326 F.2d 949 (10 Cir. 1964) 26

Universal Camera Corp. v. *N.L.R.B.*, 340 U.S. 474 (1951) 2, 3, 10, 13, 16, 19, 20, 26, 27

STATUTE:

National Labor Relations Act, as amended (29 U.S.C.A. 141 et seq.):

Sec. 10(c) 26

Sec. 10(e) 2

Sec. 10(f) 2

MISCELLANEOUS:

DLR 2-9-66; No. 28: F-1; Statement of NLRB Chairman Frank W. McCulloch before Subcommittee of House Labor Committee (Official Text) 26

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No. .....

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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Geauga Plastics Company, prays that a Writ of Certiorari issue to review the judgment to the United States Court of Appeals for the Sixth Circuit entered in this case on December 11, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported in 404 F.2d 1382, and appears herein as Appendix "C", App. pp. A28-A30. The Trial Examiner's decision was entered on September 28, 1966, and appears herein as Appendix "A", App. pp. A1-A14. The decision and order of the National Labor Relations Board was entered on June 30, 1967, on a proceeding identified on the records of the Board as 8-CA-4189 and 8-CA-4210 and officially reported at 166 NLRB No. 69, and appears herein as Appendix "B", App. pp. A15-A27.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on December 11, 1968. A Petition for Rehearing on behalf of the Petitioner herein was denied on January 23, 1969. Jurisdiction of the Court of Appeals was based upon Section 10(f) of the National Labor Act, as amended, 29 USC §160(f). Jurisdiction of this Court is invoked under 28 USC 1254(1) and §10(e) of the National Labor Relations Act, as amended, 29 USC §160(e).

QUESTIONS PRESENTED

I. Whether the decision in the Court below is in conflict and inconsistent with the standard of judicial review imposed on reviewing courts by this Court in its decision in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), in enforcing the Board's finding that three disciplinary layoffs and ultimate discharge, each directly associated with undisputed improper work performance, was pretextually motivated and in violation of Section 8(a)(3) of the National Labor Relations Act, as amended.

II. Whether the Court below in enforcing the Board created doctrine of "pretext" in mixed motivation cases has rendered a decision in conflict with the decisions rendered by different divisions of the same Court as well as decisions of other courts of appeals on the same matter with *Universal Camera, supra,* being cited by the Courts as authority for the standard of judicial review applied in each case.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), are printed in App. D, *infra,* pp. A31-A32.

STATEMENT OF THE CASE

In the summer of 1965, a union organizational campaign began among the petitioner's employees. The unit described included approximately 139 production and maintenance employees at the petitioner's plant. [J.A. 172a]* During this period of time "there was much talk in the shop about the union campaign by both rank-and-file and supervisory personnel." [J.A. 172a] The record shows that management knew that several employees favored the union in that they either expressed their desire for the union, signed bargaining cards, or were talking for the union. [(Anthony Tesso [J.A. 42a]; Judy Volk [J.A. 47a]; Stanley Volk [J.A. 48a]; Kay Bevins [J.A. 66, 69a]; and, Lorma Jean Iiams, the complaining employee [J.A. 73a])]

All union activity by the petitioner's employees occurred prior to the N.L.R.B. representation election held on October 6, 1965, wherein the union lost by a vote of 70 to 52 with no objections being filed. [J.A. 172a]

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*"J.A." refers to pages of the Joint Appendix filed in the Court of Appeals.

The Discharge of Complaining Employee

Lorma Jean Iiams, hereafter referred to as the "complaining employee", or as "Iiams", began her employment with petitioner in January, 1963, and was terminated on March 24, 1966, a period of approximately three years and three months. [J.A. 174a] During this period she worked in two departments: In the Finishing Department for about one year and three months and in the Molding Department for approximately two years. [J.A. 15a]

Two months after the union representation election, Iiams was transferred from the Molding Department to the Finishing Department. [J.A. 175a] The petitioner made the transfer to accommodate Iiams due to a pulled muscle injury she had received. [J.A. 32a] The work requirements in the Finishing Department are much lighter and less difficult than those in the Molding Department. [J.A. 66a]

The Trial Examiner discredited the complaining employee's testimony that the transfer was decided upon because she "caused trouble," [J.A. 176a], and found that "there was no question but that the transfer was for personal convenience and comfort." [J.A. 175a]

On December 27, 1965, three months after all union activity had ceased and one month after the complaining employee was given preferential treatment by transferring her to much lighter and less difficult work requirements, Iiams was given a three-day disciplinary layoff for improperly trimming excess flash off rubber dishwasher gaskets. [J.A. 19a]

Iiams admitted that she had previous experience trimming this gasket, and both the Trial Examiner and

the Board found that she admitted that more flash could have been removed from the gaskets. [J.A. 175a, 182a]

On January 12, 1966, Iiams was given a one-week disciplinary layoff by her supervisor after he received another report from the quality control inspector that she was packing bad parts. [J.A. 94a] Iiams agreed that the gaskets had been off-punched and were bad [J.A. 28a], and as a result, these parts had to be scrapped. [J.A. 27a]

On March 2, 1966, leniency was again shown the complaining employee when the general foreman discovered a carton of "terribly dirty" gaskets that Iiams had packed. [J.A. 109a] Although other employees had been given disciplinary suspension for packing dirty gaskets [J.A. 164a], no disciplinary suspension was given to the complaining employee when she offered the excuse that she had not been "specifically instructed" to wash these gaskets. (Petitioner's Ex. 9 [J.A. 164a])

On March 8, 1966, Iiams was given a one-week suspension for cutting gaskets too short. Iiams testified that she told Arbogast that she didn't think it was her fault and accused him of giving her the hardest jobs. [J.A. 22a] She also claimed that Arbogast then asked her why she didn't quit. Arbogast testified that Iiams did not protest the action taken by him with respect to her work. [J.A. 113a]

However, on this same day that Iiams undeniably destroyed "approximately 25%" of the parts she made that morning [J.A. 165a, 112a], employees Ida Cox and Doris Boice were given disciplinary layoffs for similar mistakes in cutting gaskets too short. Employee Boice was performing the cutting operation on the same gasket that the complaining employee had been mitering. [J.A.

162a, 167a] On this occasion, the complaining employee was given a written notice warning her that any future poor quality work would result in her discharge. (Petitioner's Ex. 10 [J.A. 165a])

On March 24, 1966, six months after all union activity had ceased, the complaining employee was discharged for improperly stapling over 80 out of 450 parts she had assembled on the previous day. The complaining employee did not contend that the stapling operation was a difficult procedure to perform. It required no special or unique degree of experience, skill, or training. It required no instrument, templet, or gauge to determine if the parts were being properly made. By looking at these parts, one could immediately tell whether or not the gaskets were properly stapled.

At the time of her discharge, Iiams did not attempt to explain or offer any excuse for her obvious careless conduct. *For the first time,* in an attempt to cover up her own dereliction, Iiams accused the general foreman of wanting to fire her because of her union activities six months previous. She continued her outburst by stating, "You have not heard the last from me. *I will get even with you.* I will be back." [J.A. 25a, 115a]

On September 28, 1966, Trial Examiner, Thomas A. Ricci, issued his Decision after a hearing held at Galion, Ohio, on July 28 and 29, 1966. The Trial Examiner dismissed the complaint filed on behalf of the complaining employee and found that:

> "* * * Iiams certainly gave cause for discharge, it cannot be said a prima facie case has been proved against the (Petitioner). After her third successive layoff, each directly associated with and following improper work performance, she complained, and the supervisor asked why did she not quit. In a matter of days she

repeated the same type of error. In the total circumstances, however suspect the supervisor's comment may have been, it cannot serve to obliterate the objective facts." [J.A. 176a]

The Board reversed the Trial Examiner and found that the Petitioner violated Section 8(a)(3) and (1) of the Act. [J.A. 188a] In so holding, the Board did not discuss, argue against, or controvert the following undisputed facts:

1. *Iiams' testimony discredited by Trial Examiner*: It was undisputed and unquestioned by the Board that Iiams gave conflicting and contradictory testimony which caused the Trial Examiner to discredit a portion of her partisan assertions.

2. *Iiams given preferential treatment after all union activity had ceased*: It was undisputed and without comment by the Board that in November or December, 1965, at least two and possibly three months after the N.L.R.B. representation election, Iiams was transferred to the Finishing Department by the Company so that she could perform light work due to a personal injury she received in the Molding Department.

3. *Leniency again given Iiams*: It was undisputed that leniency was again shown to Iiams on March 2, 1966, when the general foreman discovered a carton of terribly dirty gaskets that Iiams had packed. Although Iiams had three years' experience with the company and other employees had previously been disciplined for packing dirty gaskets, no disciplinary action was taken against Iiams when she stated that she had not been "specifically instructed" to wash these gaskets.

4. *Bad parts in every instance*: It was undisputed and without comment by the Board that in every instance of disciplinary action, the parts worked on by Iiams were

in fact defective and had to be either re-worked or scrapped entirely.

5. *Admitted carelessness*: It was undisputed that in virtually every instance Iiams admitted her own carelessness and lack of attention to her job.

6. *Experienced in work performed*: It was undisputed that Iiams admitted that she had past experience in performing the jobs in question in that she had either performed the *exact* operation on other occasions *or that she was familiar with the same type of job.*

7. *Defective parts first discovered by fellow employees*: It was undisputed and without comment by the Board that the defective parts were first discovered by her own fellow co-workers: Twice by employee Tillie Cibek, once by employee Ruth Carroll and once by second shift employee Shirley Kane.

8. *Independent investigation made by supervision*: It was undisputed and without comment by the Board that in every instance where improperly made parts were discovered, an independent investigation was made by her supervisor resulting in the finding that the reports of the above-named employees were true.

9. *Many employees involved in discovery of defective parts*: Counting Iiams, eight (8) employees were involved in either the discovery or investigation of bad parts. It was undisputed that none of these persons, including Iiams ever questioned or denied the fact that defective parts were in fact incorrectly made by Iiams.

10. *Unusual amount of complaints from customers during this period*: It was undisputed and without comment by the Board that during this period the company was receiving an unusual number of complaints from its customers about receiving bad parts.

11. *Many other employees disciplined during this period*: It is undisputed that during this period there were quite a few employees given time off for bad work.

The United States Court of Appeals for the Sixth Circuit held that substantial evidence supported the Board's Decision and granted enforcement of its Order. The Court did not mention or discuss any of the above stated facts which were unquestioned and uncontroverted in the record except that "(Iiams) made several mistakes". At page 1383.

Although the Court twice states that the Board's decision is supported by substantial evidence, it only cites the following to be "substantial" evidence to support the findings of the Board:

(a) That the decision of the Board is supported by the series of frequent transfers, reprimands and disciplinary layoffs to which Iiams was subjected following her activities during the union organizing campaign.

(b) That Basel Arbogast, the General Foreman who discharged Iiams, was introduced as a witness after Iiams had testified, but did not deny her charge that he had admitted transferring her to the hardest jobs he could find and asked her to quit.

(c) A portion of the testimony of Herman Haygood, an Assistant Foreman, whose employment terminated prior to the hearing, that he changed Iiams to more difficult job assignments more often than other employees.

REASONS FOR GRANTING THE WRIT

Question Number I Restated

Whether the Decision in the Court Below Is in Conflict and Inconsistent with the Standard of Judicial Review Imposed on Reviewing Courts by This Court in Its Decision in *Universal Camera Corp.* v. *NLRB*, 340

U.S. 474 (1951), in Enforcing the Board's Finding That Three Disciplinary Layoffs and Ultimate Discharge, Each Directly Associated with Undisputed Improper Work Performance, Was Pretextually Motivated and in Violation of Section 8(a)(3) of the National Labor Relations Act, As Amended.

It is apparent from the decision in this case that the Court misapplied the present standard to be used in determining whether there is substantial evidence to support the Board's findings. As held by the Supreme Court in *Universal Camera, supra*:

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board merely on the basis of evidence which in and of itself justified it without taking into account contradictory evidence or evidence from which conflicting inferences would be drawn (the Taft-Hartley Act), definitely precludes such a theory of review and bars its practice. *The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.*" At page 464.

Additional language in *Universal Camera, supra,* is particularly applicable here. Mr. Justice Frankfurter, speaking for the Court concerning the duty of courts in reviewing agency decisions, stated:

> "Evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusions. The findings of the Examiner are to be considered along with the consistency and inherent probability of the testimony. The significance of his report, of course, depends largely upon the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed

the other factors which in sum determine whether evidence is substantial." At page 496.

* * *

". . . the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown." At page 468.

* * *

"Both the statutes (the APA and Taft-Hartley Act) thus evince a purpose to increase the importance of the role of examiners in the administrative process." At page 468.

A. The Transfers, Reprimand, Disciplinary Layoffs, and Discharge on March 24, 1966, Six Months After All Union Activity Had Ceased.

The record evidence clearly established that this Company is a job shop where frequent transfers of employees from one job to another are made due to its production requirements. Iiams, in addition to other witnesses, admitted that it is customary for girls to be shifted from one job to another in the Petitioner's plant where different and frequent changes are made in the type of product being produced. [J.A. 26a] She testified on re-direct examination that it was "normal" for a girl to be shifted from "job to job". [J.A. 30a]

General Counsel's rebuttal witness, Maxine Hollenback, testified that she was transferred from job to job "according to how long the run is on the order" [J.A. 125a], and that "I've always been changed around in the Finishing Department quite a bit". [J.A. 125a] She testified that she and Iiams worked "more or less as a pair" quite a lot [J.A. 124a, 125a] and that the frequency of job shifting

while working with Iiams was "about the same amount." [J .A.125a]

The Court's finding that the reprimand, disciplinary layoffs and discharge "to which Iiams was subjected" as substantial evidence to support the Board's order is inconsistent with uncontroverted and unquestioned facts to the contrary, as listed and shown on pages 7 through 9, *supra*.

In addition to the above evidence, the findings of the Board and Court can only be accomplished by discrediting the testimony of Foremen Lilly and Arbogast who stated that the suspensions and ultimate discharge of Iiams were due to her irresponsibility and careless work performance. Although the Trial Examiner did discredit the testimony of Iiams and did not discredit Lilly or Arbogast, the Board rejected his findings based on mere suspicion if not pure speculation arrived at from the cold pages of the record.

In *Acme Products, Inc.* v. *NLRB*, 389 F.2d 104 (8 Cir. 1968), the Court in answering the question concerning the substantiality of evidence supporting the Board's order, stated:

> ". . . in resolving the crucial issues of whether the Board's determination is based upon substantial evidence on the record considered as a whole, the Trial Examiner's findings which turn on credibility determinations with respect to witnesses whom he alone saw and heard, are entitled to considerable weight." At page 106.

Furthermore, the business justification offered by companies in the cases cited above and hereinafter pales in comparison with the conduct giving rise to the discharge of Lorma Jean Iiams in the instant case.

B. The Insubstantiality, Lack of Probative Value, and Improper Reliance upon the Board's Finding That Foreman Arbogast Did Not Deny Iiams' Charge That He Assigned Her to the Hardest Jobs and Asked Her to Quit.

The finding that Basel Arbogast, the General Foreman, did not deny the charge attributed to him by Iiams that he had admitted transferring her to the hardest jobs he could find and asked her to quit, is not correct, and strains the evidence beyond any reasonable inference as an admission of unlawful motive. Arbogast's testimony concerning the conversation after disciplinary action was given Iiams for destroying "approximately 25%" of the parts she had made that morning is as follows:

> "Q. What conversation did you have with her at that time? A. I—
>
> "Q. If any. A. I don't remember any conversation at that time except to tell her that her parts were bad and that I was giving her time off.
>
> "Q. Do you have any recollection as to what she said at that time? A. No, sir, I don't.
>
> "Trial Examiner: Did she protest?
>
> "The Witness: Not to my memory, no, sir." [J.A. 112-3a]

It is clear that had Arbogast been a dishonest witness, he would have testified that Iiams definitely did not protest the disciplinary action imposed upon her. Furthermore, it can not be overlooked that the alleged accusation was attributed to Arbogast by a witness whose credibility was discredited by the Trial Examiner. Iiams gave directly conflicting testimony in an attempt to attribute another comment to Arbogast which would have left the veiled impression of an unlawful, discriminatory motive.

When applying the substantial evidence standard established in *Universal Camera, supra,* by taking "into ac-

count whatever in the record fairly detracts from its weight," a "rational inquiry into the truth" convincingly establishes that the conclusion reached by the Court was based upon evidence that was "not logically probative," as shown by the following:

1. On the same day that Iiams undeniedly destroyed "approximately 25%" of the parts she made that morning [J.A. 165a, J.A. 112a], employees Ida Cox and Doris Boice were given disciplinary layoffs for similar mistakes in cutting gaskets too short. Employee Boice was performing the cutting operation on the same gasket (i.e., 40545) that Iiams had been mitering. [J.A. 162a, 167a]

2. Furthermore, Arbogast testified that he felt that this operation was a fairly easy job [J.A. 118a], and corroborated Iiams' own testimony [J.A. 33a] that she was familiar with the mitering operation and known to be so "because (Arbogast) had her miter parts before." [J.A. 112a] General Counsel's witness Herman Hagood added further support when he testified that all it would take to run the cutting operation on these gaskets properly would be to "just watch her business." [J.A. 37a]

3. The compiling of an additional inference from Iiams' accusation that Arbogast was giving her the hardest jobs in order to get rid of her (as a pretext for an unlawful motive) is completely inconsistent with his treatment of Iiams on two occasions occurring several months subsequent to the cessation of all union activity by Iiams and everyone else.

4. In addition, to infer an unlawful motive for failing to answer the charge of an irresponsible employee that the disciplinary action taken against her was due to the difficulty of job assignments is inconsistent with rational analysis. The two disciplinary layoffs and one oral reprimand occurring prior to this incident, to-wit: Failing to

properly trim excess flash off rubber gaskets with an instrument similar to a pair of ordinary scissors; off-punching and failing to inspect the "hard and soft" gaskets which was a familiar operation to Iiams; and, failing to wash extremely dirty gaskets, cannot be considered as difficult jobs. It is difficult to imagine any foreman who was familiar with this kind of work performance dignifying such an allegation by denying it. Especially a foreman who generally supervises the work of 139 employees, and who was imposing disciplinary action on quite a few employees in an effort to correct the unusual amount of quality production problems.

An excellent analysis which should have been applied in weighing the probative value of Iiams' accusation can be found in the Sixth Circuit's previous decision, also written by Circuit Judge Phillips, in *NLRB* v. *Barberton Plastic Products, Inc.*, 354 F.2d 66 (1965). That case involved an irresponsible employee who also claimed that "someone was out to get him and he'd get even." As the Court stated:

> ". . . the uncorroborated testimony of an untrustworthy and interested witness, who stands to profit from a back pay award, may be held under such facts and circumstances not to constitute substantial evidence on the record considered as a whole. *NLRB* v. *Elias Brothers Big Boy, Inc.*, 327 F.2d 421, 425 (C.A. 6) and cases therein cited; cf. *NLRB* v. *Mount Vernon Telephone Corp.*, 352 F.2d 977 (C.A. 6).". At page 69.

C. The Improper Reliance upon Fragments of Herman Haygood's Testimony Without Taking into Account Evidence from Which Conflicting and More Appropriate Inference Could Be Drawn.

Extraction and reliance upon a portion of Herman Haygood's testimony, without reference to his total testimony as well as other evidence in the record, demon-

strates the misapplication of the *Universal Camera* substantial evidence standard. The lack of analytical reasoning in determining the probative value of a fragment of Haygood's testimony can be shown as follows:

1. Although Haygood testified that he changed Iiams to a different job assignment more often than other girls to perform work on gaskets "more complicated to put together than others" (Haygood's definition of the term "Harder jobs" [J.A. 35a]), it cannot be overlooked that:

(a) When asked to give an estimation of how often the change would be harder, Haygood testified, "There is not too many hard jobs out there, really." [J.A. 35a]

(b) On the only occasion in which discipline was imposed upon Iiams where she complained about the difficulty of the job, Haygood testified that all it would require to run the operation properly would be just "watch her business." [J.A. 27(a)]

(c) According to Haygood, the only complicated jobs were the Tappen and E&M gaskets [J.A. 39(a)] and he did not mention the "gray gaskets" as being a difficult operation, i.e., the only job that Iiams complained was difficult in which discipline was imposed.

2. There was no claim or contention by Iiams that any of the other job operations in which disciplinary action was taken were difficult to perform.

3. Maxine Hollenbach, General Counsel's rebuttal witness, testified that she and Iiams worked "more or less as a part" quite a lot and the frequency in which she was shifted in job assignments prior to working with Iiams was "about the same amount." [J.A. 125(a)]

If "discrimination consisted in treating like cases differently", as was held in *Frosty Morn Meats, Inc.* v. *NLRB*, 296 F.2d 617, 621 (5 Cir., 1961), then it is clear from the

impartial testimony of Iiams' working partner that Iiams was not treated discriminatorily.

While there are countless cases that describe the unreasonableness and illogic of extracting a portion of a witness' testimony out of context and without regard to the conflicting and substantial countervailing evidence in the record as a whole, the succinct statement contained in the recent case of *NLRB* v. *Billen Shoe Co.*, 397 F.2d 801 (1 Cir., 1968), is appropriate. Chief Judge Aldrich stated:

> "We have, on prior occasions, agreed with the Board that an employer who is unhappy about a union must, perforce, subject even his most legitimate conduct to scrutiny for improper motives. This does not mean, however, that a union organizer can do as he pleases and that the Board's findings are beyond reach because anti-union animus is all that is needed to support the inference of employer impropriety. See *NLRB* v. *Almeida Bus Lines, Inc.*, 1 Cir., 1964, 333 F.2d 725, 727. When good cause for discharge is clearly established, it is especially important to remember that the burden of proof is on the Board. *NLRB* v. *United Parcel Service, Inc.*, 1 Cir., 1963, 317 F.2d 912; *NLRB* v. *Prince Macaroni Mfg. Co.*, 1 Cir., 1964, 329 F.2d 803. We have only too frequently had to remind the Board that a decision on the issue of motive is particularly one which requires consideration of all the evidence, *and not bits and pieces which support a decision unfavorable to the employer.* See e.g., *Raytheon Co.* v. *NLRB*, 1 Cir., 1964, 326 F.2d 471." At page 803.

Question Number II Restated

Whether the Court Below in Enforcing the Board Created Doctrine of "Pretext" in Mixed Motivation Cases Has Rendered a Decision in Conflict With the Decisions Rendered by Different Divisions of the Same Court As Well As Decisions of Other Courts of Appeals

on the Same Matter With *Universal Camera, Supra,* Being Cited by the Court As Authority for the Standard of Judicial Review Applied in Each Case.

The Court's opinion in the instant case is in conflict with principles of law previously established and applied by the Sixth Circuit Court of Appeals, in addition to being inconsistent with the analysis and rationale applied by other Circuit Courts in virtually every jurisdiction.

In *NLRB* v. *Swan Super Cleaners, Inc.,* 384 F.2d 609 (1967), the Sixth Circuit Court denied enforcement of a Board finding that an employee had been discriminatorily discharged. In that case, unlike the completely irresponsible conduct of Iiams, the participant cause resulting in discharge was merely exhibiting an insubordinate attitude when a supervisor was attempting to demonstrate to the employee how to perform a "touch up" press operation to finish ironing shirts. The Sixth Circuit Court stated:

> "Even if the company knew that (the employee) was a union activist, such knowledge by the company would not insulate her from being discharged for a nondiscriminatory, good cause. *Lawson Milk Company* v. *NLRB,* 317 F.2d 756, 760 (C.A. 6, 1963)." At page 614.

In *NLRB* v. *Barberton Plastics Products, Inc., supra,* Sixth Circuit Judge Phillips stated that "the fact that an employee was participating in activities on behalf of a union does not prevent his discharge for cause." The Court also pointed out in the *Barberton Plastics* decision that discipline is not an unfair labor practice merely because "it coincides with anti-union sentiment."

In the instant case, there was no evidence that either Foreman Lilly or General Foreman Arbogast held any

anti-union sentiments. Also, there is no evidence in the record of any union activity occurring after the NLRB representation election on October 6, 1965—approximately six months prior to Iiams' discharge on March 24, 1966.

In the case of *Herb Stein, Inc.* v. *N.L.R.B.*, 368 F.2d 556 (1966), the Sixth Circuit had up for review a short form order of the Board which adopted a Trial Examiner's finding that a supervisor had interrogated an employee about union activities at or about the time union organization was underway, and that his discharge was in violation of Section 8(a)(3) of the Act.

This supervisor (according to the Trial Examiner's Finding; 152 NLRB 1196, 1199) told the dischargee that "he had no right to talk to anyone about joint unions" and after the supervisor was told by the dischargee that organization was a matter for the employees alone to determine and was, therefore, no concern to the management, the supervisor said, "Everything that goes on here—around here—concerns me." "I want to know what's going on and I also want to be told about it first."

Although this was denied by the supervisor, the Court said for purposes of applying the law, it would be assumed that it *was* said. However, this was not probative in the Court's view.

In setting aside the order of the Board, the Sixth Circuit in a Per Curiam decision held that an examination of the entire record as a "rational inquiry into truth"[1] convincingly established that the conclusions reached by the Board were based upon evidence that was "not logically probative." The Court stated:

> "The most that can be said on either score is that there is perhaps a scintilla of evidence in support of (the

1. *Universal Camera, Supra.*

Board's) rulings which, of course, will not suffice. *Universal Camera Corp.* v. *N.L.R.B., supra.*" At page 558.

In *N.L.R.B.* v. *Mt. Vernon Telephone Corp.*, 352 F.2d 977 (6 Cir. 1965), the Court reversed the Board's decision finding that an employee's demotion to another job and ultimate termination were discriminatorily motivated because of his union activities. The employee involved had been active in the successful union campaign and was elected union president seven days prior to his layoff. The Board referred, *inter alia,* to alleged coercive statements of management, to show management's preoccupation with union activities, and credited the testimony of an employee who testified that the president of the company said "within a year's time that he would be rid of the union *and everybody else that had anything to do with it.*" Although the president denied making the statement, the Trial Examiner credited the employee "on the basis of demeanor". The Board also cited the company's district manager's letter indicating general hostility toward unions. However, the Sixth Circuit found that:

> "although this letter does provide a basis for an inference of respondent's general hostility toward unions, *it does not provide a basis for an inference of wrongful motive as to a specific discharge. N.L.R.B.* v. *Atlanta Coca-Cola Bottling Co.*, 293 F.2d 300 (5 Cir., 1961), rehearing denied, 296 F.2d 896 (1961)." At page 981. (Emphasis ours)

Similar to the findings in the instant case, the court in *Mt. Vernon* pointed out that the Board's decision was "*based entirely on inferences,*" and that the scope of appellate review required that "overbearing evidence calling for contrary inferences, must be considered", citing *Universal Camera.*

Furthermore, the court's opinion in the instant case is inconsistent with its own prior decisions regarding the conclusive effect the reviewing tribunal must give to inferences not drawn from undisputed basic facts.

In the case of *Board of Publication of Methodist Church* v. *N.L.R.B.*, 297 F.2d 379 (6 Cir. 1962), the Sixth Circuit in a PER CURIAM decision reversed by the Board and held that three employees who were not discharged until several weeks after their misconduct was not due to their union activities. In so holding, the Court stated:

> "The Board's findings of fact are binding upon an appellate court if supported by substantial evidence from the record *but factual inferences to have the same conclusive effect must be drawn from undisputed basic facts.*" (Emphasis added)

The Sixth Circuit's opinion in the instant case is particularly disturbing, not only because no other court has ever construed the congressional protection contained in Section 10(c) of the Act so restrictively, but primarily because this decision in effect overrules *sub silentio* Circuit Court opinions in every jurisdiction holding that union activity does not insulate nor immunize an employee against discharge.[2] Furthermore, it fails to recognize the historic and long established principle that the burden of proof is upon General Counsel to do more than lay a foundation for mere suspicion of improper motive for discharge,[3] although the Petitioner does not rely here alone upon General Counsel's failure to sustain a case.

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2. *Hawkins* v. *NLRB*, 358 F.2d 281, 283 (7 Cir. 1966) (engaging in protected concerned activity does not immunize employees against discharge); *NLRB* v. *Supreme Bedding Company*, 196 F.2d 997 (5 Cir. 1952).

3. *NLRB* v. *Shen-Valley Packers*, 211 F.2d 289 (4 Cir. 1954); *NLRB* v. *Neuhoff Brothers*, 389 F.2d 640 (5 Cir. 1968); *NLRB* v. *Howard Quarries, Inc.*, 362 F.2d 236, 242 (8 Cir. 1966) ("Postulation based on anti-union animus or statistics do not serve as substitutes for substantial evidence to support the serious charge of Section 8(a)(3) layoffs.")

The correct analysis of the principles of law applicable here is contained in the case of *Lozano Enterprises* v. *National Labor Relations Board,* 357 F.2d 500 (9 Cir. 1966). The court there, speaking through Justice Curtis, said:

> "If unlawful discrimination can be inferred from mere union membership or activity, followed by discharge, that inference disappears when a reasonable explanation is presented to show that the employee was not discharged for union membership." At page 502.

There is additional language in the *Lozano* case that is particularly applicable here. Of the Board's inferences there, the court said:

> "The most that can be said of this evidence is that it may cause some suspicion of unlawful motives, but circumstances that merely raise a suspicion that the employer may be activated by unlawful motives in discharging an employee are not sufficiently substantial to support a finding of unlawful labor practices. *NLRB* v. *Citizen-News Company,* (9th Cir. 1943) 134 F.2d 970, 971." At page 503.
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> * * *
>
> "* * * the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was its cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one." At page 503.

In the case of *Fort Smith Broadcasting Company* v. *N.L.R.B.,* 341 F.2d 874 (8 Cir. 1965), the Court had under consideration a situation where a foreman had a general antagonism for a union, and, when the total circumstances were examined, the Court held that even an anti-union attitude was not sufficient to justify the inference of discrimination. Moreover, it held:

"If discrimination can be inferred from mere union membership and a supervisor's general antagonism for unions, that inference disappears when overwhelming evidence supports the more reasonable conclusion that valid cause motivated the employee's suspension and ultimate termination.

* * *

We remind the Board that 'an employers general hostility to unions, without more, does not supply an unlawful motive as to a specific discharge' * * * *especially, when practically all the remaining evidence establishes an unsatisfactory record of the employee, he is not entitled to special consideration in judging his responsibility for the misdeed which finally strains his employer's leniency to the breaking point.*" At page 878. (Emphasis supplied)

In *NLRB* v. *Neuhoff Brothers Packing, Inc.*, 389 F.2d 640 (1968), the Fifth Circuit Court denied enforcement in part of a Board Order to the extent that it held an employee's discharge was effectuated after the employee had been previously reprimanded for slowing down an assembly line.

The Board contended that the employee was discharged because of his known union activities. The Board argued that the Company demonstrated its unlawful effort to get rid of this employee when it secretly tape recorded both conversations in which disciplinary action was imposed in addition to secretly photographing the employee on the production line.

In reversing the Board for its failure to accept the truth of the business justification offered by the Company, Circuit Judge Rives, after summarizing leading decisions in this area, stated:

". . . we, nevertheless, synthesize these varying expressions: To constitute an 8(a)(3) violation, *an*

> *improper motive must be a cause without which the employee would not have been discharged.*" At page 647. (Emphasis ours)

The Court further stated that:

> "Once the employer has come forward with evidence to establish the existence of a legitimate motive for discharge, the burden of proving that an improper motivation contributed to that discharge lies upon the General Counsel." At page 647.

NLRB v. *Billen Shoe Co., supra,* is another excellent example of the correct application of the duty imposed on circuit courts to require more than "bits and pieces" of evidence to support the Board's doctrine of "pretext" in mixed motive cases. As the Court observed:

> "If we were to draw a further lesson from this case, and too many others like it that we have had, it is that cause for discipline was seized upon as pretextual in the case of union representatives. The fact is that adequate cause for discharge is of peculiarly legitimate concern in such instances; . . . *When good cause for criticism or discharge appears, the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one. The mere existence of anti-union animus is not enough.* The fact that the employer may be pleased to effectuate the discharge does not mean that this was his primary motive. See *NLRB* v. *Lowell Sun Publishing Co.*, 1 Cir., 1963, 320 F.2d 835, 842, 53 LRRM 2480." At page 803. (Emphasis ours)

The Fourth Circuit decision in *NLRB* v. *Greensboro Hosiery Mills, Inc.*, 398 F.2d 414 (4 Cir. 1968), contains similar reasoning.

In that case, an employee was discharged for unexcused absence, which the Board found to be in violation

of Section 8(a)(3). The Trial Examiner inferred from the fact that the employee had been active in a union campaign that the discharge was for union activities rather than for cause. The Court rejected this inference stating that there was only a scintilla of evidence that the company knew the employee was active in the union, and that the inference of improper motive was unjustified.

The Tenth Circuit Court of Appeals in *Cain's Coffee Company* v. *N.L.R.B.*, 404 F.2d 1172, made public December 24, 1968, found that the "inference" of illegal motivation in the company's termination of a union activist is overcome by the employer's explanation of "legitimate business reasons" for its move. The employee involved here had spearheaded an unsuccessful bid by the Teamsters Union to represent a unit of company sales-drivers.

The Court noted that the Board's finding of 8(a)(3) violation was based largely on the fact that the employee was terminated shortly after the NLRB election in the sales group. Circuit Judge Hill decided the Board's holding does not rest on "substantial evidence" because the timeliness factor is only a "circumstance of suspicion", rebutted by a company explanation of sound reasons for the termination. In this case, the Court decided that "the presence of legitimate business reasons underlying the dismissal is sufficient to preclude a finding of discrimination;" i.e., moonlighting after a previous warning.

The Court further stated that:

> "In view of the demonstration of a legitimate business justification for the discharge *and in the absence of any specific showing of anti-union motivation*, we conclude that the Board's finding was not based on substantial evidence. In circumstances such as these, where there is insubstantial support for the Board's inference that anti-union animus motivated the dis-

missal, *we must accord respect for a contrary inference especially where, as here, such a contrary inference was also found by the Trial Examiner.*"[4] At page 1176 (Emphasis ours).

Section 10(c) of the National Labor Relations Act, as amended, provides in part that:

"No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, *if such individual was suspended or discharged for cause.*" (Emphasis added).

Furthermore, the Board's reversal of the Trial Examiner and the Court's enforcement thereof is wholly inconsistent with the principles announced in *Universal Camera*, and with the position publicly taken by both the Board and its General Counsel, proclaiming the desirability of according "greater finality" to trial examiners' decisions.[5] Such finality should especially prevail when the questions involved are basically on issues of fact. The Trial Examiner had the only opportunity to observe the demeanor of the witnesses on direct, cross, re-direct, and re-cross-examination.

While the Petitioner is not criticizing the Board, as such, the drift of the Board's tendency to use "pretext", in Section 8(a)(3) cases, as an almost inescapable doctrine, has created the result of substituting the doctrine of "pretext" for valid discharge for cause which is statutorily protected. As a consequence, any kind of isolated conduct can be drawn into the web work and thus create

4. *NLRB* v. *Newhoff Bros. Packers, Inc., supra; NLRB* v. *Midwestern Mfg. Co.*, 388 F.2d 251 (10th Cir. 1968); *Rocky Mtn. Gas Co.* v. *NLRB*, 326 F.2d 949 (10th Cir. 1964).

5. DLR 2-9-66; No. 28: F-1; Statement of NLRB Chairman Frank W. McCulloch before Subcommittee of House Labor Committee (Official Text).

a background for the conclusion of "pretext", making it virtually impossible to discharge an irresponsible and incompetent person.

The Petitioner herein is acutely aware of this Court's statement in *Universal Camera* that its "power to review the correctness of application of the present standard ought seldom to be called into action". However, the Petitioner earnestly submits that the instant case appropriately represents that "rare instance when the standard (clearly) appears to have been misapprehended or grossly misapplied".[6]

While reasonable judicial minds will differ in degree when applying a uniform standard of review, it is inescapably clear that there is a conflict in application, analysis and rationale in appellate court opinions as shown by the numerous court decisions since *Universal Camera.* The inconsistencies of these decisions, and in particular, the inconsistencies of analysis and rationale applied in the instant case and prior decisions rendered by different divisions of the Sixth Circuit should be authoritatively resolved.

To be insulated against discharge in such circumstances similar to those presented here by the mere identification with a union and speculation based upon a compiling of inference upon inference would substitute an unjust use of authority for the law.

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6. *Universal Camera, supra;* at pages 490-1.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

By .....

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Dated: April 21, 1969.

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 8-CA-4189

GEAUGA PLASTICS COMPANY

and

UNITED RUBBER, CORK, LINOLEUM AND
PLASTIC WORKERS OF AMERICA, AFL-CIO

Case No. 8-CA-4210

GEAUGA PLASTICS COMPANY

and

UNITED RUBBER, CORK, LINOLEUM AND
PLASTIC WORKERS OF AMERICA, AFL-CIO

and

PLANT COMMITTEE

Richard A. DuRose, Esq., for the General Counsel.

Chester Nikodym, Esq., of Cleveland, Ohio, and *Mr. James H. Petersen*, of Crestline, Ohio, for the Respondent.

Mr. Charles D. Newkirk, Field Representative, of Akron, Ohio, for the Charging Party.

Before: *Thomas A. Ricci*, Trial Examiner.

Trial Examiner's Decision

Statement of the Case

A hearing in the above-entitled consolidated proceeding was held before the duly designated Trial Examiner on July 28 and 29, 1966, at Galion, Ohio. The complaint in

Case No. 4189 charges the Geauga Plastics Company, herein called the Respondent or the Company, with illegal conduct in restraining and coercing its employees with respect to their statutory right to self-organization, in violation of Section 8(a)(1) of the Act, and with unlawful discharge of one employee; the complaint in Case No. 4210 charges the Respondent with having illegally assisted, interfered with and dominated the operation and administration of the Plant Committee, and thereby violated Section 8(a)(2) of the Act. After the close of the hearing briefs were received from the General Counsel and the Respondent.

Upon the entire record and from my observation of the witnesses I make the following:

Findings of Fact

I. The business of the Respondent

Geauga Plastics Company is a wholly owned subsidiary of Geauga Industries Company, which in turn is wholly owned by Carlisle Corporation, a Pennsylvania corporation having its principal office and place of business in Carlisle, Pennsylvania. Only the Respondent's plant located at Crestline, Ohio, is involved in this proceeding. From this plant, the Respondent, which manufactures extruded molded plastic goods, annually ships products valued in excess of $50,000, to points located outside the State of Ohio. I find that the Respondent is now and has been at all times material herein, an employer engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to exercise jurisdiction herein.

II. The labor organization involved

United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, herein called the Union, is a labor

organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

A. *The plant committee*

For the last 5 years, and perhaps longer, the Company has maintained in operation in its factory, a Plant Committee established by the Company and existing pursuant to certain written rules promulgated by the Employer. There exists a printed booklet entitled "Employee Regulations," prepared by the Company and distributed to all its employees. It contains the following sections:

PLANT COMMITTEE

A—The plant committee was organized to meet with management at least once each month. This committee discusses various suggestions, plans and ideas to both the plant employees and management. Also, grievances that could not be handled by the various foremen are discussed and settled.

B—The committee is formed as follows:

An election is held once each year and each of the following groups elect one representative.

1st shift—female employees

1st shift—male employees

2nd shift—female employees

2nd shift—male employees

At the time of printing this policy book the 3rd shift is represented by the second shift committee, however, the following schedule will apply.

3rd shift—when there are 25 regularly scheduled employees—one representative. When there are 40 regularly scheduled employees—one male representative, one female representative

GRIEVANCES

A—Employees are requested to go to their foreman with any questions, problems or suggestions, but in event the employee has a matter that cannot be satisfactorily handled by the foreman, he (or she) may go to a member of the plant committee and explain the problem, etc. Thus determination will be made at the next committee meeting. If for any reason, the above-procedure does not suffice, any employee will be welcome to discuss his needs with the Production Superintendent or the General Manager upon request for an appointment.

The practice has been that whenever there is a vacancy on the committee a foreman or other management representative so advises the employees of a particular department and tells them to gather and select one of their members. The election takes place sometimes in the work area, sometimes in the foreman's office. Normally, committee meetings with the Company take place once a month, but sometimes less frequently, or whenever there are questions to be considered. Again, it is the Company which decides when meetings are to be held, a supervisor tells a committee member or other, and conferences take place between the members and the representatives of the Company, always in the plant and sometimes in the superintendent's office. The employees are always paid for time spent in these gatherings, be it to elect members or to discuss their grievances and desires with the Employer.

There were received into evidence typewritten minutes of the meetings held on November 18 and December 13, 1965, January 7, February 23, March 29, April 28, May 31 and June 14, 1966. A great variety of subjects were discussed and decided at these conferences, including such things as picnic plans, the purchase of phonograph records to be played during work hours, parking facilities, courtesy

towards supervisors, and matters of that type. The following issues also are reported in writing as having been discussed: (1) Saturday being scheduled as a regular scheduled workday; (2) seniority based on time worked; (3) double shifts being counted in seniority; (4) why make 8-hour rate when only work 7½ hours? (5) Will 3 days off for disciplinary action be counted for absenteeism? (6) Will third shift employees get paid for the auto accident on November 7 because they were unable to work? (7) Will the employees have Friday, November 26 off? (8) Will the employees get their raise and paid hospitalization this year? (9) Saturdays will count on seniority effective December 1, 1965; (10) New Ford cartons are too heavy to be moved by the women; (11) the rule for being off on leave for 3 months then being hired in as a new employee is under advisement; (12) will the girls in the molding department be eligible for the 5-cent raise in April? (13) Will the plant shut down for vacation? (14) Can something be set up whereby second shift employees can attend high school graduation exercises the day after a holiday and still not lose their holiday pay?

I find, contrary to the denial in the Respondent's answer, that the plant committee is a labor organization within the meaning of Section 2(5) of the Act. The minutes of the meeting show convincingly that it represents the employees vis-a-vis the employer on matters relating to wages and other terms and conditions of employment. I also find, as alleged in the complaint, that the Respondent has in the past and now continues to render unlawful assistance and support to the committee. Its entire underlying authority stems from rules of employment established unilaterally by the Company; the employees meet on rare occasion, without presence of management representatives, to vote upon and determine a consensus of opinion on any question which the committee members and the

Company jointly decide should be submitted directly to the employees. There is no other activity of the committee apart from what has been detailed above; it is literally a creature of the Respondent, formed, controlled and dominated by the Company. I conclude that by maintaining the plant committee, by rendering it assistance and support, and by fully dominating it, the Respondent has violated Section 8(a)(2) of the Act. In its brief the Respondent "offers no objection to the disestablishment" of the plant committee.

B. *Interference, restraint and coercion*

An organizational campaign began among the employees in about July of 1965. On petition filed by the Union (Case No. 8-RC-6039) the Board's Regional Director issued a Decision and Direction of Election on September 9, 1965, and an election among the Respondent's approximately 139 production and maintenance employees was held on October 6; the Union lost the election by 70 to 52. No objections were filed.

There was much talk in the shop about the union campaign by both rank-and-file and supervisory personnel. The Union held meetings and word was passed about openly, both before and after the meetings. Anthony Tesso, an extrusion machine operator, testified that in August Aley Smith, then an assistant foreman, asked him how the Union was "going," and did Tesso think it was a "good thing." Tesso asked how Smith would vote, and the answer was "no." Smith became a foreman shortly after the election, and, as alleged in the complaint and as admitted in the answer, a supervisor as defined in the Act and an agent of the Respondent. In February, he asked Tesso would the Union "come back," and when Tesso said he thought yes, the foreman told him: "If you want a chance out here again when the Union comes around you

better talk him down, talk against it . . . that is how I got to my chance again . . . if I would not have talked against the Union and that Union would have got in . . . that he [Smith] would have been the first one out of the door."

Smith did not testify, and I credit Tesso's uncontradicted testimony and find that Smith told the employee that he, Smith, was promoted because he spoke out against the Union, and that Tesso must do the same if he wished to advance in his employment. This illegal promise of advancement by the foreman as a reward for rejecting the Union constituted unlawful coercion upon the employees in violation of Section 8(a)(1) of the Act.

Judy Volk testified that about a week before the start of October 1965, James Bell, the finishing department foreman, asked had she heard anything about the Union and had she signed a card. She said yes, and Bell then explained why he did not want a union in the plant, because it would "take over" and preclude the employer's freedom to give raises. On October 2, the day after a publicized union meeting, still according to Mrs. Volk, Bell asked her "how the union meeting went." She said she had not yet decided which way to go, and he then told her: "Well, I've got my little list of names . . . that went to the union meeting."

Foreman Bell also spoke to employee Kaye Bevins about the union meeting. She testified there was much talk between the two of them before the meeting, in which she made clear she favored the Union. Bell then asked her not to use her influence to prevail upon others to go her way, to leave them to decide for themselves. Bell also told Bevins, as she recalled, that the "knew . . . who was going to vote for the Union and who wasn't."

Bell admitted having discussed the union meeting with individual employees. He told one girl, Miss Markum, he

knew she had gone to the meeting. He asked another, Kaye Bevins, whether she was going. He denied asking Judy Volk whether she had attended or telling her he had a list of any kind. Bell also testified, however, that he did tell Miss Markum he knew who was attending the meeting, and that "I had a list of all the people that had gone."

On the basis of the demeanor of Foreman Bell at the hearing and of his own admissions, I credit the testimony of Volk and Bevins. Accordingly I find that the foreman questioned employees concerning their attendance at union meetings, and that he told Volk he had a list of those who had been present and Bevins that he knew exactly how the employees would vote in the coming election. Such statements constituted clear intimation to the employees that the Respondent was surveying their union activities and, necessarily, as the Board has repeatedly found, coerced and restrained them in their right to decide the question of union representation free of employer interferences.[1] In the light of such intimidating tactics, and of Foreman Smith's threat to Tesso that promotion with the Company was conditioned upon an antiunion attitude, the interrogation must also be deemed as illegally coercive in itself.[2] I find that by such statements of Foreman Smith and Bell the Respondent violated Section 8(a)(1) of the Act.

C. The discharge of Lorma Iiams

Lorma Iiams worked for the Company for about 3 years before her discharge on March 23, 1966. She was active in the summer of 1965 in the union campaign, visiting upwards of 50 employees at their homes, soliciting signatures to union cards, and generally talking it up. She did all this, for the most part, before the election, and manage-

1. *Gal Tex Hotel Corp.*, 154 NLRB No. 22.
2. *Blue Flash Express Co.*, 109 NLRB 591.

ment knew she was among those who favored the Union, although she testified she limited her union activities to off premise locations. To what extent others may also have campaigned on behalf of the Union the record does not show, it cannot be said, therefore, that Iiams was particularly outstanding among the moving spirits, or that the Respondent believed her to be a principal actor.

She had been working a year or two in the molding department, when, in late November 1965, she was transferred to the finishing department, where a variety of functions are performed. In her direct testimony Iiams said she asked General Foreman Arbogast why the change, and that Arbogast answered: "None of the girls get along with me. I caused trouble." On cross-examination she plainly stated a quite different reason. "Well, I hurt my back in Molding. They sent me to the Doctor. The Doctor said I pulled a muscle in my arm. I took a slip back and I gave it to Basel [Arbogast]. That is when he pulled me out of Molding." "The Doctor told me not to do any more hard pulling or pushing." In the end there was no question but that the transfer was for the purpose of placing her on the lighter work for personal convenience and comfort.

In the finishing department Iiams made a number of mistakes in her work. That these errors in fact occurred, and that each indeed reflected carelessness on her part, she admitted. On December 27 she did not properly trim excess flash from certain vulcanized parts she was finishing; her foreman imposed a 3-day disciplinary measure. Early in January she off-punched about 40 parts—they became scrap—out of approximately 300 pieces she had made. This time she was laid off a whole week in reprimand. On March 8 again she was suspended for a week, this time because she cut certain gaskets too short by mistake.

Now the suspension was accompanied by written notice that another such offense would mean discharge.

On the day of her discharge Iiams was working on certain gaskets on which parts are stapled by machine. She stapled them in such a way that a necessary part was punctured where this was not supposed to happen. Of about 450 such gaskets she made 80 that could not be used. With this final error as the stated reason by her supervisor, she was released outright.

The complaint alleges that all three of the short layoffs imposed upon Iiams, as well as her final discharge, were motivated by an intent to discourage hers, as well as the prounion sentiments of other employees. I do not think a preponderance of the substantial record evidence in its entirety suffices to prove this element of the complaint, and shall therefore recommend dismissal with respect to Lorma Iiams.

The Respondent knew she favored the Union, but it has not been shown she was, or that the Company believed her to be particularly outstanding in her activities. It is true the Respondent was opposed to collective bargaining, as evidenced by the coercive and illegal statements of its foremen. There is no significant indication, however, that its animus was directed against her individually. In the light of her total testimony, I do not credit her statement that the general foreman told her the transfer 4 months before her discharge was decided upon because she "caused trouble." She was by no means the only employee to be disciplined in this fashion for errors of work or for other reasons. Record slips showing layoffs of four other employees for varying periods between July and March of 1966 were placed in evidence. Paulette Cozad, an employee witness for the General Counsel, called to testify that she had also made errors and had not been disciplined, also ad-

mitted "there was quite a few people given time off for bad work." When, to all this, is added the fact Iiams certainly gave cause for discharge, it cannot be said a *prima facie* case has been proved against the Respondent. After her third successive layoff, each directly associated with and following improper work performance, she complained, and the supervisor asked why did she not quit. In a matter of days she repeated the same type of error. In the total circumstances, however suspect the supervisor's comment may have been, it cannot serve to obliterate the objective facts.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in section III, above, occurring in connection with its operations set forth in section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the above findings of fact, and upon the entire record of the case, I make the following:

Conclusions of Law

1. Geauga Plastics Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, is a labor organization as defined in Section 2(5) of the Act.

3. By coercively interrogating employees concerning their union activities, by creating the impression that management is surveying their union activities, and by promising promotion in employment in return for rejection of any union as collective-bargaining agent, the Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By initiating, forming and dominating the plant committee the Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(2) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I recommend that the Respondent, Geauga Plastics Company, Crestline, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Dominating or interfering with the formation and administration of the Plant Committee or any other labor organization.

(b) Coercively interrogating employees concerning their union activities, conveying the impression to the employees that their union activities are being surveyed by management, promising advancement in employment as a reward to employees for rejecting collective bargaining through any union, or in any like or related manner interfering with, restraining, or coercing its employees

in the exercise of the right guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from, and completely disestablish, the Plant Committee as the representative of any of its employees for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment.

(b) Post at its plant in Crestline, Ohio, copies of the notice attached hereto and marked Appendix.[3] Copies of said notice, to be furnished by the Regional Director for the Eighth Region, shall, after being duly signed by the Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Eighth Region, in writing, within 20 days from the date of receipt

3. In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

of this Decision, what steps the Respondent has taken to comply herewith.[4]

It is further recommended that the complaint be dismissed insofar as it alleges illegal discrimination in the discharge of Lorma Iiams.

Dated at Washington, D. C.

/s/ Thomas A. Ricci
Trial Examiner

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4. In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 8-CA-4189

GEAUGA PLASTICS COMPANY

and

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO

Case No. 8-CA-4210

GEAUGA PLASTICS COMPANY

and

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO

and

PLANT COMMITTEE

Decision and Order

On September 28, 1966, Trial Examiner Thomas A. Ricci issued his Decision in the above entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom, and take certain affirmative actions, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint and recommended dismissal of those allegations. Thereafter, the Charging Party filed exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and the entire record in this case, including the exceptions, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified below.

The Trial Examiner found that the General Counsel had not established by a preponderance of the evidence that Respondent's three layoffs and ultimate discharge of employee Lorma Jean Iiams were motivated by an intent to discourage the prounion sentiment of Iiams and other employees. We disagree.

Iiams began working for Respondent in January 1963 and, prior to the Union's organizing campaign, had never been reprimanded by Respondent for poor work performance or for any other reason. In the summer of 1965, Iiams was contacted by the Union with reference to its desire to regain its representative status among Respondent's employees. Thereafter, Iiams personally visited the homes of some 50 employees, over one-third of the employees in the unit being organized, and solicited their signatures on the Union's authorization cards.

Iiams had worked in the molding department for about two years and was junior in seniority only to employee Majorie Sieb, with whom Iiams had worked regularly for over a year on the assembly of a Ford part. Sometime during the Union's organizing campaign, Respondent be-

came aware of Iiams' extensive union solicitation activities.[1] In August 1965, employee Trudy Forshaw was placed in Iiams' regular job and Iiams was transferred to various jobs in the same department. She first worked for about two months with two recently hired girls gluing a new Ford part. Then, according to Iiams' uncontradicted testimony, she was "switched around from molder to molder, from molder to molder." In late November 1965, and apparently for medical reasons, Iiams was transferred to lighter work in the finishing department, where she was again shifted frequently from one job to another.[2]

On the morning of December 27, Iiams was assigned the job of trimming, inspecting, and packing vulcanized gaskets. At about 10:30, Tillie Cibek, the quality control inspector, removed 4 or 5 gaskets from a box which Iiams had packed and showed them to Gordon Lilly, the foreman of the finishing department. Lilly checked a few more gaskets in the box and then showed Iiams about 6 gaskets which had excess flash on them. Iiams acknowledged that more flash could have been removed from the gaskets and Lilly admitted on the record that the gaskets could have been retrimmed. Instead of permitting Iiams to retrim the gaskets, Lilly gave the gaskets to Arbogast, and called

1. James Bell, then foreman on the third shift in the finishing department, testified that employee Mary Carver told him Iiams was one of the girls who was passing out the cards. Thereafter, according to Bell's testimony, he asked General Foreman Basel Arbogast, "If they had gotten enough cards to hold a vote?" Arbogast replied, "Yes. He thought that they had." Bell asked, "If he knew who was passing the cards out?" Arbogast said, "Possibly Jean Iiams was one. There were probably a lot more but he didn't know for sure." Herman Haygood, an assistant foreman and Iiams' immediate superior in the finishing department, testified also that everybody knew that Iiams was for the Union.

2. While it appears from the record that some of the employees in the finishing department, on occasion, were shifted from job to job because of Respondent's production requirements, Haygood testified that he "changed [Iiams] around more" than any of the other employees.

Iiams into his office and told her she was being suspended for 3 days for packing faulty gaskets. Iiams testified that she was familiar with the work and that she had trimmed the gaskets on this date in the same manner as she had in the past.

On January 13, 1966, Iiams was assigned the job of punching hard and soft gaskets. Lilly testified that after receiving another report from Cibek, he went over and checked 5 or 6 gaskets which Iiams had punched and found them to be bad.[3] Iiams testified that she had off-punched 35 of the last 50 gaskets which she had done that day, but that Cibek came over and inspected the gaskets before she had a chance to inspect them herself.[4] Iiams testified further that she filled out a scrap sheet and placed it in a little box; and that, at the end of the day, Lilly called her into his office and said he was going to have to give her a week off "because I was costing the Company money with bad scrap." It appears that Lilly had not seen the scrap sheet at the time he called her into the office and suspended her. Lilly testified that he took Iiams into his office after she had checked and reported to him the number of faulty gaskets, and told her she was being suspended for running bad parts the second time within two weeks.[5] When asked on cross-examination if he had ever suspended an employee

3. Employee Paulette Cozad testified without contradiction that she had already packed the gaskets and put her inspection slip in the box.

4. The record shows that altogether Iiams punched about 300 gaskets, a total of 40 of which were off-punched. The record also shows that approximately 400 gaskets were punched on the three shifts, about 62 of which were off-punched.

5. On cross-examination, Lilly testified that he told Iiams she was being suspended for "packing bad parts." It is clear that Cozad, and not Iiams packed the gaskets. Elsewhere in Lilly's direct testimony, he testified that he told Iiams to "make sure that she did not pack any bad parts," and that he inspected the pieces in the box rather than those on the table because "this is what she was supposed to have inspected."

twice before, Lilly testified; "I don't remember whether I have or not. Usually when we give an employee time off they don't return."

Unlike previously suspended employees, Iiams did not quit after her suspension, but returned to work, and, for the first time on March 8, was assigned the job of cutting certain gaskets on a mitering machine. Iiams operated the machine until about 10:00 or 10:30 that morning when both the trimmer and Haygood noticed that the gaskets were running short. Haygood checked the 7 boxes which had been filled by this time and found that some of these pieces were short also. He then notified Arbogast who thereafter took Iiams off the job. At the end of the day, Arbogast called Iiams into his office and placed the blame on her for cutting the gaskets short. He suspended her for a week. Iiams protested that it was not her fault and then said, "[Those] gaskets are hard, they had a hard time running them ever since they started them." Later in the conversation, Iiams told Arbogast, "Well, you are giving me the hardest jobs you can find." to which Arbogast replied, "Yes. Why don't you quit?" Iiams stated, "I am not quitting. You will have to fire me first."[6]

Although Arbogast testified that the job last assigned Iiams was easy, employee Laura Argo, the regular operator on that job, gave the following description: "Well you have to miter. There are three pieces of gaskets. One is a center piece and there is a space in the center about that far (indicating) and a little bit further (indicating) and you got to be very careful. It is a tedious job to get them in. You miter that in on one machine. Then you cut the other two ends off on another machine.

6. Iiams' charge that she was being assigned hard jobs by Arbogast is corroborated, in part, by Haygood's testimony, as noted above.

You got to pull them back against the block, which can't be shoved in real hard, you have to come in or another cutter." She further testified, "Well, you just got to know how to put that gasket in there and do it. It is a very tedious job putting it in there. It is not an easy job." Argo also testified, "We all made mistakes on it. All tricks made mistakes, the same mistakes on them."

Following this suspension and a brief absence due to death in her family, Iiams refused to "quit" as urged by Arbogast, but returned to work and did trimming for the first two days. However, on the third day, March 23, she was again re-assigned to work with employee Helen Clary in assembling and finishing a gasket for an IBM machine. This gasket consists of a hollow piece of extruded rubber tubing into which is inserted a piece of magnetic material that is stapled into the ballon of the gasket. When properly assembled, the staples do not protrude through the outside of the ballon. It appears from the record that the two employees first work together measuring, trimming, and notching a supply of the tubing and magnetic material. Then, while one employee continues this operation and inserts the magnetic material into the tubing, the other performs the stapling operation. Iiams was assigned to work on this job in the absence of employee Lois Starcher, who, after the job was set up, normally continued with the first operation and Clary performed the stapling. Iiams had not performed this job before. When Iiams was first assigned, Haygood showed her how to cut on two of the guillotine cutters, and Arbogast showed her how to notch on the notcher. After Clary and Iiams has spent about an hour getting the job set up, Arbogast came over and told Iiams that she would have to do the stapling. Arbogast adjusted the stapling gun and stapled a couple of the parts in order to show Iiams how the operation should be per-

formed. He showed her one that was improperly stapled so that the staple was piercing through the outside of the ballon and cautioned her against this procedure. He watched her staple several parts and then left the line. Arbogast testified that he checked Iiams' work once or twice during the morning and she seemed to be doing the work properly. Arbogast testified further that at the end of the shift, and after receiving word from his second shift foreman, he checked the last box of parts worked on by Iiams and found them to be bad. Whereupon, he directed the foreman to check her work and was advised that more than 50 out of 300 parts were improperly stapled. Arbogast pulled Iiams' timecard and discharged her the following day, allegedly for bad work. According to Arbogast, Iiams said, "I knew that you had wanted to fire me because of my union activity. You have not heard the last from me. I will get even with you. I will be back." Arbogast did not deny Iiams' charge.

A careful analysis of the foregoing facts, and the record as a whole, convinces us that Respondent singled out Iiams because of her known union solicitation activities and embarked on the foregoing course of conduct for the purpose of getting rid of Iiams in order to discourage the organizational efforts of its employees. Thus, in August 1965, Iiams was abruptly transferred, without explanation, from her regular job to various jobs in the molding department, each of which changed with predictable frequency. In the absence of some plausible explanation by Respondent, we do not believe that this abrupt change in Iiams' job status can be isolated from Respondent's knowledge or suspicion of Iiams' activities on behalf of the Union.[7] Indeed, it appears from Bell's conversation

7. We do not consider it material to our decision herein that Respondent may not have known the extensive nature of Iiams' solicitation on behalf of the Union. Respondent knew that some employees were soliciting cards for the Union, and Iiams' name stood out as the only one which had been positively identified to the Respondent.

with Arbogast that Respondent became aware of Iiams' solicitation of union cards before or around the time the petition was filed in the representation proceeding, Case No. 8-RC-6039.[8]

Nor do we find any basis in the record for isolating Respondent's sudden and frequent changes in Iiams' job status from its subsequent conduct in first suspending and finally discharging her. Respondent clearly demonstrated its union animus by the unfair labor practices which it committed during the Union's preelection campaign. Then, at the very time that Respondent professed a lack of antiunion motives in its post-election treatment of Iiams, Respondent, in addition to committing other unfair labor practices, reactivated the plant committee and embarked on a course of domination, assistance, and dealings with the committee in flagrant disregard of its employees' rights to select a bargaining representative of their own choosing, and attempted thereby to frustrate any future organizational efforts of the employees.[9] In the light of these unfair labor practices and the unrefuted testimony in the record that Arbogast admitted giving Iiams the hardest jobs he could find and asking her to quit,[10] we find that the reasons asserted by Respondent for Iiams' 3 disciplinary layoffs and discharge were pretexts used by Respondent to mask its unlawful plan to get rid of Iiams.

Other evidence in the record supports the conclusions which we have reached. Thus, the record shows that Iiams was suspended abruptly on December 27, without prior

8. We take official notice of the fact that the representation petition was filed on August 10, 1965.

9. This conduct assumes even greater significance since the record shows that the illegal committee was first established by Respondent shortly after the Union had been ousted as the employees' collective-bargaining representative.

10. We do not consider Respondent's testimony as either contradicting or denying Iiams' testimony to this effect.

warning that her work was deficient in any manner for what appears to have been a minor infraction, one which occurred at a time of day when it could have been corrected readily by Iiams herself.[11] While one of the reasons, if not the principal reason as it appears from the record, for Iiams' suspension on January 13 was that she "packed" bad parts, the record clearly shows that employee Cozad actually packed the gaskets and placed her inspection slip in the box, facts which the most casual investigation should have revealed to Respondent. As to Iiams' suspension on March 8 for cutting gaskets short, the testimony of the regular operator, Laura Argo, makes short shrift of Respondent's attempt to belittle the difficulty involved in the operation. Indeed, Argo's testimony indicates that the operation required, over and above the exercise of extreme care, a certain degree of skiil or dexterity which an employee, as in the case of Iiams, would not ordinarily be expected to demonstrate without some previous experience on the operation. In addition to Arbogast's failure on March 24 to deny Iiams' charge that Respondent wanted to fire her because of her union activity, the record evidence of the events of the previous day discloses highly suspicious and unexplained circumstances surrounding Iiams' transfer to the stapling operation. Thus,

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11. We find wholly unpersuasive Respondent's claim that Lilly did not know of Iiams' union activities when he suspended her. As noted above, both Lilly's immediate superior, Arbogast, and his assistant foreman, Haygood, knew of Iiams' union activities.

Unlike the Trial Examiner, we do not find that other employees had been suspended in circumstances similar to Iiams. Thus, the record shows that employee Judy Herrman, who was given a week's suspension for packing dirty gaskets, was given a prior warning for the same offense on the previous day. Penny Britton, who was suspended 3 days for packing improperly mitered parts, admitted that she did not pay attention to instructions. Hazel Vaughn, who was given 2 days off for filling out her work tickets improperly, was instructed twice and warned once about the tickets before she was suspended. This was not true in Iiams' case. Indeed, the Respondent produced no evidence of another employee who was treated as severely as Iiams.

as it appears in the record, Iiams was performing satisfactorily the operations normally performed by Starcher, the absent employee whom she replaced. However, Respondent unaccountably assigned Iiams to perform the stapling operation which employee Clary, who was present, normally performed. When these circumstances are considered along with the other evidence detailed herein, we are persuaded, and find, that Arbogast assigned Iiams to the stapling operation in anticipation that she would make mistakes and spoil materials so that he could have a pretext for discharging her. Accordingly, and contrary to the Trial Examiner, we find that Respondent, by its conduct in assigning Iiams to "the hardest jobs [it could] find," then suspending and finally discharging her, violated Section 8(a)(3) and (1) of the Act.

Amended Conclusions of Law

We hereby adopt the Trial Examiner's Conclusions of Law, and hereby make the following additional Conclusion of Law, the present Conclusion of Law 5 to be renumbered as 6.

"5. By discriminatorily suspending and discharging Lorma Jean Iiams to discourage membership in or activities on behalf of the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act."

The Remedy

As we have found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, we shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. We shall also amend the Trial Examiner's Recommended Order to include a broad cease and desist order.

As we have found that Respondent discriminatorily suspended and discharged Lorma Jean Iiams, we shall order her reinstated, without prejudice to her seniority or other rights and privileges previously enjoyed by her, to her former or substantially equivalent position, and made whole for any loss of pay she may have suffered by reason of her discriminatory suspensions and discharge. Her backpay shall be computed on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth*, 90 NLRB 289, and shall include interest at 6 percent per annum, as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, Geauga Plastics Company, Crestline, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Renumber the present paragraph 1(b) as 1(c), and add the following as paragraph 1(b) in the cease and desist portion of the Trial Examiner's Recommended Order:

"(b) Discharging or suspending its employees for having engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

2. Delete from the present paragraph 1(b), and the fourth substantive paragraph of the Appendix attached to the Trial Examiner's Decision, the words "like or related" and substitute the word "other."

3. Renumber the present paragraphs 2(b) and 2(c) as 2(e) and 2(f), respectively, and add the following paragraphs:

"(b) Offer Lorma Jean Iiams immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of pay which she may have suffered as a result of the discrimination against her, in the manner set forth in that portion of our decision entitled 'The Remedy'."

"(c) Notify Lorma Jean Iiams, if she is serving in the Armed Forces of the United States, of her right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces."

"(d) Preserve and, upon request, make available to the Board, or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

4. Delete the last sentence in the Trial Examiner's Recommended Order.

5. Insert immediately after the third substantive paragraph of the Appendix attached to the Trial Examiner's Decision the following paragraphs:

WE WILL NOT discharge or suspend our employees for engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL offer Lorma Jean Iiams immediate and full reinstatement to her former or substantially equivalent

position, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of pay which she may have suffered as a result of the discrimination against her.

6. Add the following immediately above the line at the bottom of the Appendix:

NOTE: We will notify the above-named employee, if presently serving in the Armed Forces of the United States, of her right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

Dated, Washington, D. C. June 30, 1967.

John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
(Seal) National Labor Relations Board

APPENDIX C

No, 18076

United States Court of Appeals

for the Sixth Circuit

Geauga Plastics Company,
Petitioner,

v.

National Labor Relations Board,
Respondent.

Petition for Review and Cross Petition for Enforcement of an Order of the National Labor Relations Board.

DECIDED DECEMBER 11, 1968.

Before: Phillips, Edwards and McCree, Circuit Judges

Phillips, Circuit Judge. The company petitions to review and set aside the order and decision of the Board reported at 166 N.L.R.B. No. 60, and the Board has filed a cross-petition for enforcement.

The principal question before this Court is whether substantial evidence on the record considered as a whole supports the finding of the Board that the Company discharged Lorma Iiams discriminatorily because of her activities as a union adherent, in violation of §8(a)(3) and (1) of the Act.

Iiams began working for the Company in January 1963, and until after she took a leading part in the Union's organizing campaign had never been reprimanded for poor work or for any other reason. At the beginning of her Union activities she was second in seniority in her de-

partment. Shortly after the filing of the Union's election petition she was transferred unexpectedly and without explanation to another job. Thereafter she was transferred to different jobs in the molding department and then was transferred out of the molding department altogether because of an arm injury. Later she was assigned to a number of different jobs in the finishing department, where she made several mistakes. After one oral reprimand and three disciplinary layoffs for improper work performance she was fired on March 24, 1966.

The Board, in disagreement with its Trial Examiner, found that the shifting of Iiams from one job to another was motivated by discriminatory purposes; that the Company singled her out because of her known union activities and embarked on a course of frequent transfers to difficult jobs for the purpose of getting rid of her; and that her foreman gave her the "hardest jobs he could find and asked her to quit." The Board ordered reinstatement with backpay.

The Company contends that the job shifts of Iiams were made on the basis of production requirements and that she was discharged for incompetent work.

Upon review of the transcript we hold that the finding of the Board of a §8(a)(3) and (1) violation in the discharge of Iiams is supported by substantial evidence, including the testimony of Herman Haygood, an assistant foreman. Basel Arbogast, the general foreman who discharged Iiams, was introduced as a witness after Iiams had testified, but he did not deny her charge that he had admitted transferring her to the hardest jobs he could find and asked her to quit. The decision of the Board is further supported by the series of frequent transfers, reprimands and disciplinary layoffs to which Iiams was sub-

jected following her activities during the Union organizing campaign.

We therefore hold that the conclusion of the Board concerning the discriminatory discharge of Iiams and ordering her reinstatement with backpay is supported by substantial evidence on the record considered as a whole.

Two other questions are presented by the company: (1) Whether the employer engaged in unlawful threats, interrogation and surveillance in violation of §8(a) (1) of the Act; and (2) whether the company violated §8(a) (2) of the Act by establishing, assisting, supporting and dominating a plant committee. The Court finds that these two questions are not subject to judicial review, because the company failed to file exceptions with the Board as required by §10(e) of the Act and §102.46(h) of the Board's rules and regulations. *N.L.R.B.* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318; *Marshall Field & Co.* v. *N.L.R.B.*, 318 U.S. 253. We find no extraordinary circumstances in this case to excuse failure to file exceptions with the Board.

Enforcement granted.

APPENDIX D

STATUTES

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

(29 U.S.C.A. §160(c)); Section 10(c):

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the

complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1304

GEAUGA PLASTICS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A28–A30) is reported at 404 F. 2d 1382. The Board's decision and order (Pet. App. A15–A27) are reported at 166 NLRB No. 69.

JURISDICTION

The decree of the court of appeals was entered on December 11, 1968, and a petition for rehearing was denied on January 23, 1969 (Pet. 2). The petition for a writ of certiorari was filed on April 23, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

351—344—69

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the petitioner discriminated against one of its employees because of her union activity.

STATUTE INVOLVED

The revelant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.
>
> SEC. 8.(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.
>
> * * * * *

STATEMENT

In July 1965, the Union[1] began a campaign to organize the Company's employees (J.A. 172a).[2] Lorma

[1] United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO.

[2] "J.A." references are to the Joint Appendix printed by the parties in the court below.

Jean Iiams, an employee in the Molding Department, was the first employee solicited by the Union, and subsequently became an active organizer on its behalf, who personally urged approximately 50 or 60 employees to join the Union and sign cards (J.A. 181a; 15a–16a). Her activity on behalf of the Union was common knowledge around the plant, and on at least one occasion was brought to the attention of Company foreman Bell by another employee (J.A. 191a and n. 1; 38a, 39a, 72a–73a).

On August 10, shortly after the Union filed an election petition with the Board,[3] Iiams, who had never received a reprimand in her three years of employment with the Company, was unexpectedly and without explanation transferred to an entirely different job (J.A. 181a–182a, 186a, n. 8; 17a–18a). She worked at this job for about two months, but during the course of the next month was "switched around from molder to molder" (J.A. 182a; 18a).

Iiams was later transferred out of the Molding Department because of an arm injury, and was sent to the Finishing Department (J.A. 182a; 18a–19a, 32a). There, general foreman Arbogast requested the assistant foreman of the department to transfer Iiams more frequently than other employees,[4] and to give her more difficult job assignments (J.A. 182a, n. 2; 34a–35a). Accordingly, Iiams was principally assigned to trim a "Hercules" gasket, which is very heavy and

[3] The election was held on October 6, and the Union lost by a vote of 70 to 52 (J.A. 172a).

[4] The employees were transferred from one job to another on occasion because of production requirements.

hard to work with (J.A. 182a; 124a–125a). About a month after her transfer to the Finishing Department, she was reprimanded and summarily suspended for three days for improperly trimming another kind of gasket; in the past such faulty gaskets had been shipped out without reprimand or, at most, sent back to be retrimmed (J.A. 182; 19a, 31a, 86a, 92a, 101a).

Shortly thereafter Iiams was given the task of punching hard and soft gaskets (J.A. 183a; 19a, 81a). The quality control inspector reported that some of the gaskets Iiams had punched were faulty, because a piece of plastic had become lodged in her machine (J.A. 183a; 27a). The foreman did not check the gaskets on Iiams' desk; instead, he checked some which her partner had inspected and packed in a box with her own inspection slip (J.A. 183a; 81a, 94a, 101a, 104a–105a). Finding some of these gaskets to be incorrectly punched, he instructed Iiams to fill out a report for the office (J.A. 183a; 94a, 104a–105a). When Iiams came to the office at the end of the day with her report, the foreman summarily suspended her for a week without looking at the report (J.A. 183a; 20a, 105a).

When Iiams returned to work, she was again reassigned, this time to the difficult and tedious task of mitering gaskets (J.A. 183a; 21a, 121a, 122a). Mistakes on this job were frequent, and assistant foreman Haygood admitted that he had himself cut the gaskets too short on one occasion. Nonetheless, when he discovered that Iiams, who had been performing the job for only a few hours, had cut some gaskets short, she was immediately reassigned to another job. And at

the end of the day she was again suspended for a week, with a warning that the next time she made this mistake she would be fired (J.A. 184a; 22a–23a, 37a). Iiams protested that she did not think the mistake was her fault, because the Company had always experienced difficulty with that particular operation, and observed that the Company was giving her the hardest jobs it could find (J.A. 184a; 22a–23a). Foreman Arbobast responded, "Yes. Why don't you quit?" (*ibid.*).

Iiams returned to work a week later, and on her fourth day of work was again reassigned, to work on an IBM gasket (J.A. 184a–185a; 23a–24a, 76a). This work was generally done by Starcher, who would do the cutting and notching of the gasket, and Clary, who would do the stapling (J.A. 185a; 23a, 76a–79a). Iiams was shown how to perform Starcher's job, and she and Clary worked together for about an hour (J.A. 185a; 24a). Then, foreman Arbogast came over, showed Iiams how to do Clary's job, and ordered the employees to exchange jobs (J.A. 185a; 24a, 76a–77a). Although Arbogast checked Iiams' work several times during the remainder of the day, and appeared to be satisfied with her performance, he told her on the following morning that she had stapled 80 gaskets out of 450 incorrectly, and that she was fired (J.A. 185a; 24a–25a, 78a, 114a–115a).

The Board found that the Company transferred, suspended, and ultimately discharged Iiams, not because of her work deficiencies, but because of her union activity, and thus violated Section 8(a) (3) and (1) of the Act. In so finding, the Board relied upon

the entire record, including Iiams' uncontradicted testimony that general foreman Arbogast had admitted giving her the hardest jobs he could find and the union animus reflected by the Company's other unfair labor practices.[5] (Pet. App. A21–A24.) The Board ordered the Company, *inter alia*, to reinstate Iiams to her former or equivalent position, and to make her whole for any loss of earnings suffered as a result of the Company's unlawful action (Pet. App. A26). The court of appeals sustained the Board's findings and enforced its order (Pet. App. A28–A30).

ARGUMENT

The petition presents only a contention that the Board erred in finding that the Company's treatment, suspension, and ultimate discharge of Iiams were motivated by her union activities, rather than by her work deficiencies, as urged by the Company. Such an evidentiary issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. In any event, the evidence before the Board amply supports its findings that the reasons advanced by the Company for its action against

[5] The Board found that the Company had established a plant committee to deal with layoffs and grievances, in violation of Section 8(a) (2) and (1) of the Act, and that it had interrogated its employees about their union activities, made unlawful promises of benefit, and created the impression that the employees' union activities were under surveillance, in violation of Section 8(a) (1) (Pet. App. A3–A8). The Company does not challenge these findings here.

Iiams were pretexts, and that the real reason for that action was her active union involvement.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1969.

[6] In reversing the Trial Examiner's contrary conclusion, the Board accepted his credibility determinations, but drew different inferences from the evidence in the record. The Board was entitled to do so. *Oil, Chemical and Atomic Workers* v. *National Labor Relations Board*, 362 F. 2d 943, 945–946 (C.A.D.C.).

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